

FILE COPY

Office - Supreme Court U.S.

CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [REDACTED] 26

ALLEN POPE,

*Petitioner,*

*vs.*

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF CLAIMS AND BRIEF IN SUPPORT  
THEREOF.

GEORGE ROBERT SHIELDS,  
*Counsel for Petitioner.*

HERMAN J. GALLOWAY,  
JOHN W. GASKINS,  
FRED W. SHIELDS,  
*Of Counsel.*

## INDEX.

	Page
Petition for writ of certiorari and brief in support	1
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Specification of errors to be urged	4
Reasons for granting writ	4
Conclusion	5

### CITATIONS.

#### Cases:

<i>Alcock v. United States</i> , 74 C. Cls. 308	10
<i>Boudinot v. United States</i> , 18 C. Cls. 716	10
<i>De Luca v. United States</i> , 84 C. Cls. 217	10
<i>Edwards v. United States</i> , 79 C. Cls. 436	11
<i>Garrett v. United States</i> , 70 C. Cls. 304	11
<i>Grant v. United States</i> , 5 C. Cls. 80; 18 C. Cls. 732	11
<i>Hawkins, Receivers, etc., v. United States</i> , 96 C. Cls. 357	11
<i>Klein's Case</i> , 13 Wall. 128	8
<i>Mack Copper Co. v. United States</i> , 97 C. Cls. 451	10
<i>Mansfield, et al. v. United States</i> , 89 C. Cls. 12	11
<i>Murphy v. United States</i> , 35 C. Cls. 494	10
<i>Nock v. United States</i> , 1 C. Cls. 71; 2 C. Cls. 451	9
<i>Nolan Bros., Inc., v. United States</i> , 98 C. Cls. 41	11
<i>Pocono Pines v. United States</i> , 73 C. Cls. 447	11
<i>Pope v. United States</i> , 76 C. Cls. 64; 303 U. S. 654	3
<i>Southern Pacific Co. v. United States</i> , 68 C. Cls. 223	10, 11
<i>United States v. Grant</i> , 110 U. S. 225	11
<i>Williams v. United States</i> , 289 U. S. 553	8

#### Statute:

Act of February 27, 1942 (Private Law 306, 77th Congress)	2
---	---

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1943**

---

**No. 684**

---

**ALLEN POPE,**

*vs.*

*Petitioner,*

**THE UNITED STATES,**

*Respondent.*

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF CLAIMS.**

---

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above case.

**Opinion Below.**

The opinion of the Court of Claims (R. 47) is not yet officially reported.

**Jurisdiction.**

The judgment of the Court of Claims was entered January 3, 1944 (R. 60). The judgment of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

### Question Presented.

The single question involved in this case is: Is the Special Act of February 27, 1942 (*post.* p. 2), constitutional?

### Statute Involved.

The only statute involved is the Act of Congress, approved February 27, 1942 (Private Law 306, 77th Congress) reading as follows:

#### "An Act

"To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs, or personal representatives, against the United States.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction be, and the same is hereby conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs, or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

"Sec. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed, as to lower the

upper 'B' or 'pay' line three inches, and to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into dry packing.

"Sec. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

"Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases."

### **Statement.**

The petitioner was a contractor with the United States for the construction of a tunnel forming a part of the Washington water supply system, in the construction of which a number of disputes arose between him and the contracting officer. These, not being settled to the satisfaction of the petitioner, were carried to the Court of Claims. That court considered the claims submitted, allowing some of them and disallowing others, including those now asserted (76 C. Cls. 64). Motions for new trial were filed but were denied. Petitioner, without the aid of counsel,

unsuccessfully sought a review of the matter by the Supreme Court (303 U. S. 654).

Thereafter he sought relief from Congress, and the Special Act (*ante*, p. 2) was enacted.

A petition under the Special Act was thereupon filed in the Court of Claims (R. 1-9), and some additional testimony was taken. Without making any findings of fact, the Court of Claims rendered the decision now complained of (47). The court in effect held (Judge Littleton dissenting) that the Special Act was unconstitutional in that it was a legislative direction of judicial action.

### **Specification of Errors to Be Urged.**

The Court of Claims erred:

1. In holding that the Special Act was an unauthorized legislative direction as to the basis for deciding the claim involved.
2. In holding in effect that the Special Act was unconstitutional and void, as an unauthorized direction by the Congress of a judicial function.
3. In failing to render a judgment on the claims.

### **Reasons for Granting the Writ.**

1. The decision of the court below involves an important constitutional question, and is therefore of the class of cases which this Court will customarily review.
2. The decision of the court below is erroneous and is in conflict with a long line of earlier decisions by that court and with what should be regarded as settled law on the subject.
3. The questions presented are of wide importance and are of a kind that have not been passed upon by this Court.



**Conclusion.**

The assigned errors, and reasons for granting the writ asked will be discussed in the short brief accompanying this petition. The writ should be allowed.

GEORGE ROBERT SHIELDS,  
*Attorney for Petitioner.*

HERMAN J. GALLOWAY,  
JOHN W. GASKINS,  
FRED W. SHIELDS,  
*Of Counsel.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 684

ALLEN POPE,

vs.

*Petitioner,*

THE UNITED STATES,

*Respondent.*

**BRIEF IN SUPPORT OF PETITION FOR CERTIORARI**

**1. Assignments of Error.**

- (a) *Does the Special Act Involve an Unwarranted Legislative Direction to the Court of Claims?*

The answer is "No." The Special Act involves no *direction* to the court except to render a judgment, *for or against* this petitioner. The Special Act purports to do only three things—all of which would seem within the authority of Congress and none of which is outside of such authority—

(1) Congress, representing the Government, recognizes that an obligation exists upon certain claims and gives the Court of Claims jurisdiction to determine and render judgment thereon; (2) the act waives certain defenses, i. e., *prior adjudication*, lapse of time, etc.; and (3) the act



directs judgment, not *for* or *against*, but judgment on certain prescribed claims.

There is no direction for a *rehearing* of old and previously decided claims. The direction is for a *hearing* of a *new* case—on the basis of the testimony in the *old* case, plus any *new* testimony in the *new* case. The lower court seems to have concluded that this was an unwarranted impingement by the *legislative* upon the *judicial* branch of Government as telling it, a court, what to do.

Petitioner submits that nothing in the act can properly be construed as a direction by Congress (approved by the Executive) to do or not to do a particular thing. Congress has created an obligation where the Court of Claims had said no obligation previously existed. Congress is certainly authorized to create obligations of the United States. Congress has here recognized that at least a moral or equitable obligation exists and has provided that such obligation should be enforced by the Court of Claims and has given the Court of Claims jurisdiction to enforce the same.

The act is plain and not substantially different from scores of earlier acts. Congress was only doing what the court often before had accepted as proper. The Court of Claims has only the jurisdiction and authority given it by Congress. The Special Act involves only a legislative enlargement of the court's *jurisdiction*, and not a *restriction* on its judicial prerogatives.

#### (b) *Is the Special Act Constitutional?*

The Court of Claims is a *legislative* court (*Williams v. United States*, 289 U. S. 553). Nothing in the *Klein* case, 13 Wall. 128, lends support to the conclusion that the Court of Claims, a creature of Congress, is immune from proper directions by its creator. Even assuming that the *legisla-*

the exercise of a *judicial* function, the question would still remain: May the Congress, as here, give authority to the Court of Claims to consider as a new cause of action certain claims as to which no such jurisdiction could otherwise exist?

The question seems to be self-answered. The Special Act here involved was a constitutional exercise by Congress of the authority it had, and involved no infringement or curtailment of constitutional judicial functions, dignities or authorities.

## 2. Reasons for Granting Writ.

### (a) *A Constitutional Question.*

The conclusion of the lower Court by every inference, but with some reserve as to words, is that the Special Act here involved constitutes an unconstitutional infringement by the *legislative* branch of a *judicial* function pertaining to the judicial branch. It cannot be doubted, therefore, that the question here involved is a constitutional question of a kind that this Court should review.

### (b) *Decision in Conflict with Earlier Decisions.*

Over a long period, dating from the creation of the Court of Claims, Congress has again and again, and many times, given that Court jurisdiction to consider claims or cases, which on one account or another—lapse of time, prior adjudication, etc., would otherwise be barred. No other case has been found where the Court of Claims declined to accept the jurisdiction conferred or to pursue the course indicated by such special act.

In *Nock v. United States*, 2 C. Cls. 451, a special act referred to the Court "for its decision in accordance with

principles of equity and justice", a claim which had therefore been disallowed (1 C. Cls. 71). Under the special act a judgment was awarded in Nock's favor.

In *Alcock v. United States*, 74 C. Cls. 308, the facts were quite similar. Notwithstanding a prior judgment in the same matter, the Court, under the special act, reconsidered the matter and awarded judgment in Alcock's favor.

The case of *De Luca v. United States*, 84 C. Cls. 217, is exactly in point, except that there was no indication in the special act of the basis to be followed by the Court in arriving at the intendment of the act. De Luca, an Italian, under comity of remedy, had sued the United States, but had been denied a recovery by that Court. He thereupon obtained the passage of a special act giving the Court of Claims "jurisdiction to hear and determine the claim of Carlo De Luca and to award him just compensation for losses and damages, if any," on certain specified accounts, notwithstanding lapse of time, prior settlements, laches or *res judicata*. Although the Court had previously considered this identical claim, it thereupon tried the case again and awarded a large additional judgment to De Luca. One may wonder why the Court's present objections were not raised then.

*Mack Copper Company v. United States*, 97 C. Cls. 451, is identical in fact except that in that case, while an additional amount was found due the plaintiff, a balance in excess of such amount was found due the United States, so there was no net judgment in favor of the plaintiff. The special act (then unquestioned) there was very much on all-fours with the special act now held invalid by the Court of Claims.

There are numerous decisions to like general effect: *Boudinot v. United States*, 18 C. Cls. 716; *Murphy v. United States*, 35 C. Cls. 494; *Southern Pacific Co. v. United States*.

68 C. Cls. 223; *Garrett v. United States*, 70 C. Cls. 304; *Edwards v. United States*, 79 C. Cls. 436; *Mansfield, et al. v. United States*, 89 C. Cls. 12; *Hawkins, et al., Receivers of Norfolk Southern Railroad Company, v. United States*, 96 C. Cls. 357; *Nolan Bros. Inc. v. United States*, 98 C. Cls. 41. A general discussion of the matter of jurisdiction is found in *Pocono Pines Assembly Hotels Company v. United States*, 73 C. Cls. 447.

As above stated, no case before this has been found where the Court of Claims has declined to accept the added jurisdiction conferred upon it, or to proceed in whatever manner was indicated by such special act. Question: Was the present act properly disregarded by the Court of Claims as an unauthorized Congressional direction to it? The answer is that the Court of Claims being a legislative court and hence an arm of Congress, is subject to the will and direction of Congress in all matters affecting legislative action.

The case of *Grant v. United States*, 18 C. Cls. 732; *United States v. Grant*, 110 U. S. 225, involved a plain legislative direction to the Court of Claims "to reopen and readjudicate" a case theretofore decided eighteen years earlier (5 C. Cls. 80). Pursuant to such act the Court did "reopen and readjudicate" the case making an additional allowance of \$14,016.29. The Government filed an appeal. The Supreme Court dismissed the same, saying:

"Certainly the old judgment is not opened to an appeal by the readjudication, and there is nothing to indicate the new part of the judgment can be separated from the old for the purposes of review here."

Neither the Court of Claims nor the Supreme Court indicated any thought that the direction by Congress was otherwise than proper.

(c) *Case of General Interest.*

Many cases, particularly Indian claims, are arising under special acts. A final decision as to the proper interpretation of such special acts is therefore of wide and large general interest.

GEORGE ROBERT SHIELDS,  
*Attorney for Petitioner.*

HERMAN J. GALLOWAY,  
JOHN W. GASKINS,  
FRED W. SHIELDS,  
*Of Counsel.*